TRANSCRIPT OF RECORD

SUPREME COURT OF THE STATE

OCTOBER TERM, 1903

No.

AL WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF

FILED APRIL 30, 1904.

(21,193.)

(21,136.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 733.

AL WILLIAMS, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 29, 1908.

1 *Caption.*

Pleas Before Hon. W. H. Evans, Judge Garland Circuit Court.

In re STATE OF ARKANSAS
vs.
AL WILLIAMS.

Drumming on Trains.

2 *Information.*

In Justice Court, County of Garland.

Before Jack Archer, J. P.

THE STATE OF ARKANSAS, Plaintiff,
vs.
AL WILLIAMS, Defendant.

Information.

Comes H. B. Means, Prosecuting Attorney for the State of Arkansas, in the Seventh Judicial Circuit and in the name and by the authority of said State, informs Jack Archer a justice of the peace, in and for the County of Garland, in said State, that Al Williams on the 10th day of December 1907, in the County and State aforesaid, did, unlawfully, *did* drum and solicit business and patronage for a boarding house by then and there passing cards and soliciting persons to his boarding house; he the said Al Williams being then and there on a passenger train contrary to the form of the statute in such cases made and provided against the peace and dignity of the State of Arkansas, and the said Attorney for the State prays that a warrant may issue for the arrest of the said Defendant, and that he may be apprehended and dealt with according to law.

H. B. MEANS,
Prosecuting Attorney.

STATE OF ARKANSAS, *County of Garland:*

H. B. Means says that he believes the statements set forth in the foregoing complaint are true.

Subscribed and sworn to before me this 10th day of December, 1907.

JACK ARCHER, *J. P.*

3 Filed this 10th day of Dec. A. D. 1907.
JACK ARCHER,
Justice of the Peace.

Filed Dec. 10, 1907.
ED PARHAM, *Clerk.*
1—733

4 *Warrant of Arrest.*

The State of Arkansas to any Sheriff, Constable, Coroner, or Policeman in this State:

It appearing that there are reasonable grounds for believing that Al Williams has committed the offense of Drumming on the train in the County of Garland; you are therefore commanded forthwith to arrest him and bring him before me, to be dealt with according to law.

Given under my hand, as Justice of the Peace for Garland County, this 10th day of Dec. 1907.

JACK ARCHER,
Justice of the Peace.

Endorsed.

STATE OF ARKANSAS, *County of Garland:*

I have this 10th day of Dec. A. D. 1907, duly served the within by arresting the within named Al Williams and have him now in Court as therein commanded.

JOHN L. SMITH,
Constable.
GEORGE HOWELL,
Deputy Constable.

Filed this 10th day of Dec. A. D. 1907.

JACK ARCHER,
Justice of the Peace.

Filed Dec. 10, 1907.
ED PARHAM, *Clerk.*

5 *Appeal Bond.*

We, Al Williams, principal & N. W. Moody, Surety acknowledge ourselves indebted to the State of Arkansas in the sum of one hundred and ten dollars, to be void upon this condition:

Whereas, said Williams has appealed from the judgment of Jack Archer, a Justice of the Peace for Hot Springs Township, Garland County, in an action between the State of Arkansas, Plaintiff, and said Williams, Defendant.

Now if the said Williams will prosecute his appeal, with due diligence to a decision, and if, on such appeal the judgment of the justice be affirmed; or if on trial in the circuit court, judgment be given against the appellant he shall satisfy the judgment or if his appeal be dismissed, he shall pay the judgment of the justice, together with the cost of the appeal, this bond shall be void.

AL WILLIAMS.
N. M. MOODY.

Filed this 10th day of Dec. 1907.
ED PARHAM, *Clerk.*

6 STATE OF ARKANSAS
vs.
AL WILLIAMS.

On Dec. 10th, 1907, comes H. B. Means and files before me an affidavit charging that Al Williams did in the county of Garland on or about Dec. 10th, 1907, commit the crime of unlawfully drum and solicit business and patronage for a boarding house by then and there passing cards and soliciting persons to his boarding house; he, the said Al Williams being then and there on a passenger train contrary to the form of statute, in such cases made and provided and against the peace and dignity of the State of Ark. and the said Att'y for the State prays a warrant may issue for the arrest of the said defendant, that he may be apprehended and dealt with according to law.

Wherefore a warrant was issued, and placed in the hands of the Constable of Hot Springs Township, Dec. 10th, 1907.

JACK ARCHER, *J. P.*

On Dec. 10th, 1907, comes defendant in person and by Att'y Geo. B. Rose, also comes H. B. Means Prosecuting Attorney; both defendant and State announce ready for trial the defendant enters a plea of not guilty; after hearing the evidence, the charge is sustained.

It is therefore ordered that the defendant pay to the State of Arkansas the sum of Fifty Dollars and all costs in this cause expended.

JACK ARCHER, *J. P.*

On Dec. 10th, 1907, comes defendant and files affidavit and bond for an appeal to the Garland Co. circuit court; said bond accepted and appeal granted.

It is therefore ordered that this cause be transferred to said Court, together with papers and process be certified to the Clerk of said Court.

JACK ARCHER, *J. P.*

7 STATE OF ARKANSAS, *County of Garland:*

I, Jack Archer, Justice of the Peace within and for Garland Co. State of Ark. do certify that the above and foregoing is a true and perfect transcript from my docket of the judgment and proceedings in above Cause. Given under my hand this 10th day of Dec., 1907.

JACK ARCHER, *J. P.*

Filed Dec. 10, 1907.
ED PARHAM, *Clerk.*

8 In the Garland Circuit Court.

At the September, 1907, term thereof, on the 10th day of December, 1907, the same being a day of said term of said court, when the following, among other proceedings were had, to-wit:

Judgment.

No. 1942.

STATE OF ARKANSAS, Plaintiff,
vs.
AL WILLIAMS, Defendant.

Judgment. Appeal.

On this day comes the State by her prosecuting attorney, and comes also the defendant in person and by his attorneys, Rose, Hemingway, Cantrell & Loughborough, and this cause is submitted to the court for its consideration and judgment, sitting as a jury, upon the pleadings and upon the agreed statement of facts; and the court being well and sufficiently advised as to all matters of fact and law arising herein, and the premises being fully seen, doth find the defendant guilty as charged in the information, and assess his punishment at a fine of fifty dollars.

It is therefore considered, ordered and adjudged by the court, that the State of Arkansas, for the use of Garland County, do have and recover of and from the defendant, Al Williams, the sum of fifty dollars as fine, and all the costs of this action, and that the defendant be remanded into the custody of the sheriff of Garland County until said fine and costs are fully paid or secured according to law.

It is further ordered, that the defendant be permitted to give bail in the sum of one hundred dollars, pending the appeal in this case. And comes the defendant and presents his bond in proper form, and is approved by the clerk, and this judgment superseded pending the appeal to the Supreme Court.

Comes the defendant in person and by his attorneys and files his motion for a new trial herein, which is submitted to the
9 court, and the court being well and sufficiently advised, doth overrule the same, to which ruling of the court, the defendant at the time excepted, and prayed an appeal to the Supreme Court of this State, which is granted, and the defendant is given 5 days in which to tender and file his bill of exceptions herein.

And now comes the defendant in person and by his attorneys, and tenders and files his bill of exceptions, which is signed by the presiding Judge, and ordered to be made a part of the record in this case.

10 *Bill of Exceptions.*

Garland Circuit Court.

STATE OF ARKANSAS
vs.
AL WILLIAMS.

Bill of Exceptions.

On the 10th day of December, 1907, this cause was submitted to the Court on the following agreed statement of facts:

11 *Agreed Statement of Facts.*

Garland Circuit Court.

STATE OF ARKANSAS
vs.
AL WILLIAMS.

Agreed Statement of Facts.

The defendant has for six years been keeping a boarding house in the City of Hot Springs and was keeping the same on the 10th day of December, 1907, when he entered a train of the Little Rock & Hot Springs Western Railway Company while running in the county of Garland and State of Arkansas and solicited and drummed the passengers on said train to induce them to come to his said boarding house to board during their sojourn in said City; and said defendant was so engaged in drumming and soliciting upon said train when he was arrested. He had paid his fare as a passenger on said train, and was riding as such passenger while engaged in drumming and soliciting.

These are the facts agreed to by the State and the defendant.

H. B. MEANS, *Pros. Att'y,*
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *Att'ys for Def't.*

Thereupon the defendant asked the following declarations of law:

Defendant's Declaration of Law.

Garland Circuit Court.

STATE OF ARKANSAS
vs.
AL WILLIAMS.

Defendant's Declarations of Law.

1. Upon the facts charged in the affidavit and upon the agreed statement of facts the defendant is not guilty of any criminal offense.

12 2. The Statute of the State of Arkansas under which the defendant is prosecuted deprives him of liberty and property without due process of law.

3. Said Statute deprives defendant of the equal protection of the law.

These the court refused and to its refusal to give each of them the defendant at the time excepted.

Thereupon the Court found that under the agreed statement of facts the defendant was guilty of drumming for a boarding house,

in violation of the Act of the General Assembly of the State of Arkansas, approved April 30, 1907 and entitled:

"An act for the protection of passengers and for the suppression of drumming and soliciting upon railroad trains and upon the premises of common carriers."

Thereupon the defendant filed the following motion for new trial.

13 *Motion for New Trial.*

Garland Circuit Court.

STATE OF ARKANSAS
vs.
AL WILLIAMS.

Motion for New Trial.

The defendant moves for a new trial herein, because he says:

1. The judgment of the Court is not justified by the agreed statement of facts.
2. The court erred in overruling defendant's first declaration of law.
3. The court erred in overruling defendant's second declaration of law.
4. The court erred in overruling defendant's third declaration of law.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

14 This was overruled by the court and to its action the defendant at the time excepted; and on the same day tenders this, his bill of exceptions, which is examined, found correct, signed and ordered to be made part of the record in this cause, this 10th day of December, 1907.

W. H. EVANS,
Circuit Judge.

Filed Dec. 10, 1907.
ED PARHAM, *Clerk.*

15 *Appeal Bond.*

Garland Circuit Court.

STATE OF ARKANSAS
vs.
AL WILLIAMS.

Appeal Bond.

The defendant, Al Williams, having prayed and been granted an appeal to the Supreme Court from the judgment of the Garland

Circuit Court, rendered herein against him at its September Term, 1907, for a fine of fifty dollars, and being permitted to give bond in the sum of One hundred dollars, now we covenant to and with the plaintiff that said defendant upon a final determination of his appeal will appear and surrender himself in the Garland Circuit Court, or, if he fails to do so, that we will pay to said plaintiff the sum of one hundred dollars.

Witness our hands this 10th day of December, 1907.

AL WILLIAMS.
N. M. MOODY.

Filed Dec. 10, 1907.
ED PARHAM, *Clerk.*

16 *Cost Bill.*

Fee Bill.

J. P. Cost	$3.75
Court Cost	2.75
Pros. Att'y	10.00
Fine	50.00
Clerk	2.40
Transcript	5.00
	$73.90

Attest:
ED PARHAM, *Clerk.*

Certificate.

Certificate of Transcript.

STATE OF ARKANSAS, *County of Garland:*

I, Ed Parham, Clerk of the Circuit and Chancery Courts and *ex officio* Recorder, within and for said County, do hereby Certify that the foregoing 14 pages contain a true and perfect copy and transcript of papers and record in case of State of Ark. *vs.* Al Williams, as therein set forth, and as the same appears of record and on file in my office in said County.

Witness my hand and seal of said Circuit Court, this 12th day of Dec., 1907.

[SEAL.] ED PARHAM, *Clerk.*

17 *Filing in Supreme Court.*

No. 1276.

AL WILLIAMS
vs.
THE STATE.

Garland. W. H. Evans, J.

Transcript.

Filed Dec. 16th, 1907.

P. D. ENGLISH, *Clerk.*

18 *Orders in Supreme Court.*

STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 20th day of January, 1908, a day of said term:

AL WILLIAMS, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Garland Circuit Court.

On motion this cause is set down for oral argument and submission on February 24th prox.

19 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 24th day of February, 1908, a day of said term:

AL WILLIAMS, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Garland Circuit Court.

This cause being regularly called, come the parties thereto by attorneys and said cause is submitted upon oral argument and upon the transcript of the record and the briefs filed, and is by the Court taken under advisement.

20 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 9th day of March, 1908, a day of said term:

Judgment Supreme Court.

AL WILLIAMS, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Garland Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Garland County, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be and the same is hereby in all things affirmed with costs, and that unless said appellant shall within fifteen juridical days surrender himself to the proper authority in execution of said judgment, his bond be declared as forfeited.

It is further considered that said appellee recover of said appellant all her costs in this Court in this cause expended and have execution thereof.

Wood, J., dissents.

21 *Opinion Sup. Court.*

In the Supreme Court of Arkansas, March 9, 1908.

No. 168.

WILLIAMS
v.
STATE OF ARKANSAS.

Opinion.

MCCULLOCH, *J.:*

Appellant Williams is the keeper of a boarding house in the City of Hot Springs and he appeals to this court from a judgment of conviction for drumming on a railroad train for his boarding house, in violation of a statute enacted by the General Assembly April 30, 1907. The section of this statute which it becomes important to consider is as follows:

"SECTION 1. That it shall be unlawful for any person or persons, except as hereinafter provided in section 2 of this Act, to drum or solicit business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, on the train, cars or depots of any railroad or common carrier operated or running within the State of Arkansas.

"Any person or persons plying or attempting to ply said vocation of drumming or soliciting, except as provided in section 2 of this

Act, upon the trains, cars, or depots of said railroads or common carriers, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty ($50) nor more than one hundred dollars ($100) for each offense."

The title of the statute is "An Act for the protection of passengers, and for the suppression of drumming and soliciting upon railroad trains and upon premises of common carriers."

The constitutionality of the statute is attacked on the grounds (1) that it is an unlawful restriction upon the liberty of action and inherent rights of the citizen in the pursuit of lawful business and (2) that it deprives the classes of citizens therein named of the equal protection of the law in that it is an unjust discrimination against them.

Both points of attack upon the statute involve a consideration of the State's exercise of the police power, its scope and limitation—a fruitful subject of discussion in all the courts of the country. While it is admitted by all that this power is incapable of precise definition and that its lines of delimitation are not clearly marked, yet the abundance of discussion on the subject found in the numerous decisions of courts of last resort leave us not without chart and compass for the ascertainment of its general scope. Happily we are not without precedents in the decisions of this court.

The Supreme Court of the United States in a recent case said: "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. * * * And the validity of a police regulation, whether established directly by the State or by some body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose." C. B. & Q. Ry. Co. *v.* Drainage Comm'rs. 200 U. S. 561, 592.

In a still later case that court announced the same doctrine and upheld, on the ground that it was a regulation designed to promote the general prosperity, a statute of the State of Idaho which prohibited the herding and grazing of sheep within two miles of the dwelling-house of a land owner. Bacon *v.* Walker, 204 U. S. 311.

The court said: "We do not enter, therefore, into the discussion whether the sheep industry is legitimate and not offensive. Nor need we make extended comment on the two mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be obvious. It is not shown by quoting the provision which expresses the limit. The mere distance expresses nothing. It does not display the necessities of a settler on the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from a large flock of sheep, or the relation of the sheep industry to other industries. These may be considerations which induced the statute, and we cannot pronounce them insufficient on surmise or on the barren letter of the statute."

These cases are cited to show that the exercise of the police power is not limited to regulations to promote the public health, morals or safety, and that it may be so extended to such regulations as will promote the public convenience and general prosperity.

The same principle controlled this court in upholding the statute known as the Screen Law for the protection of miner. McLean *v.* State, 81 Ark. 304.

The following cases may be examined with profit in determining the scope of this power. Ohio Oil Co. *v.* Indiana, 177 U. S. 190; Clark *v.* Nash, 198 U. S. 361; Plessy *v.* Henderson, 163 U. S. 537.

This court has sustained a statute prohibiting physicians from soliciting patients through drummers. Thompson *v.* Van Lear, 77 Ark. 506; Burrows *v.* City of Hot Springs, Ms. Op.

That statute was sustainable on different grounds, however—that of protection of public health and morals, though the same arguments were made against its validity as against the statute now under consideration.

In Emerson *v.* Town of McNeil, 84 Ark. 656, the court sustained a town ordinance making it unlawful for any person to solicit customers for any hotel, boarding-house, restaurant or hack-line upon the depot platform of a railroad company while passenger trains were stopped there. The authority of an incorporated town
24 to pass such an ordinance was found only the statute of the State giving authority to "regulate the drumming or soliciting of persons arriving on trains; but the ordinance was prohibitory in its terms and the court sustained it. The court said: "And the power conferred and exercised is not obnoxious to, or an interference with, any common right, but is a proper exercise of the police power, and is universally sustained," citing McQullin on Municipal Ordinances, secs. 28, 184; St. Paul *v.* Smith, 27 Minn. 364; Veneman *v.* Jones, 118 Ind. 41. We think that decision is conclusive of the case at bar, and that it is correct in principle.

It is not doubted that there are limitations upon the legislative exercise of the police power, or that it is a judicial question for the courts to determine whether or not a given regulation is reasonable and falls fairly within the power of the legislature. The duty of the courts to interfere when the police power is unreasonably exercised is too well settled to be now questioned. L. & A. Ry. Co. *v.* State, 106 S. W. 960; City of Helena *v.* Duyer, 64 Ark. 424; 2 Tiedeman on State & Federal Control of Persons & Property, p. 987; Lawton *v.* Steele, 152 U. S. 137; Lochman *v.* New York, 198 U. S. 57; *Ex parte* Whitewell, 98 Col. 83.

It is the duty of courts, in testing the validity of a given regulation to resolve all doubts in favor of the legislative action and to sustain it unless it appear to be clearly outside the scope of reasonable and legitimate regulation. L. & A. Ry. *v.* State, *supra;* Bacon *v.* Walker, 204 U. S. 311.

Thus testing the statute we do not find it either unreasonable or beyond the power of the legislature. The previous decisions of this court hereinbefore referred to *is* conclusive of that question.

The legislature clearly has the power to make regulation for the

convenience and comfort of travellers on railroads and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importunities of drummers. It is suggested in argument that the statute was especially aimed at the protection
25 of travellers to the city of Hot Springs. If this be so we can readily see additional reason why the regulation is a wholesome one. A large percentage of those travellers are persons from distant States who are mostly complete strangers here and many are sick. Drummers who swarm through the train soliciting for physicians, bath-houses, hotels, etc. makes existence a burden to those who are subjected to their repeated solicitations. It is true that the traveller may turn a deaf ear to these importunities but this does not render it any the less unpleasant and annoying. The drummer may keep within the law against disorderly conduct and still render himself a source of annoyance to travellers by his much beseaching to be allowed to lead the way to a doctor or a hotel.

It is also argued that the act, literally construed, would prevent any person of the classes named from carrying on a private conversation on a train concerning his business. This is quite an extreme construction to place upon the statute and one which the legislature manifestly did not intend. We have no such question however, before us on the facts presented in the record.

This statute is not an unreasonable restriction upon the privilege one should enjoy to solicit for his lawful business which, it is rightfully urged, as an incident to any business. It does not prevent any one from advertising his business or from soliciting patronage except upon trains etc. This privilege is denied him for the public good. It is a principle which underlies every reasonable exercise of the police power that private rights must yield to the common welfare.

Neither is the statute an unjust discrimination against the class of persons named therein. The power of classification is, within reasonable bounds, with the legislature subject to judicial review. Bacon *v.* Walker, *supra;* Insurance Co. *v.* Dabney, 189 U. S. 301; Insurance *v.* Daggs, 172 U. S. 557.

26 The legislature in framing this statute met a condition which existed and not an imaginary or improbable one. The class of drummers or solicitors mentioned in the act are doubtless the only ones who ply their vocation to any extent on railroad trains. It is rare that the commercial drummer finds opportunity to meet customers and solicit trade on trains, therefore the law makers deemed it unnecessary to legislate against an occasional act of that kind.

Affirmed.

Wood, J., dissenting.

27 STATE OF ARKANSAS:

In the Supreme Court.

I, P. D. English, Clerk of the Supreme Court of the State of Arkansas, do hereby certify that the above and foregoing pages of

typewriting contains a true, perfect and compared copy of the transcript of the record of the case of State of Arkansas *v.* Al Williams, on appeal from the Garland Circuit Court, together with all motions orders etc. had in the Supreme Court in said case.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Little Rock, this the 22nd day of April, A. D. 1908.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk of the Supreme Court of the State of Arkansas.
By W. P. SADLER,
Deputy Clerk.

28 Supreme Court of the United States.

AL WILLIAMS
vs.
STATE OF ARKANSAS.

Assignment of Errors and Prayer for Reversal.

The said Al Williams having filed his application for writ of errors to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Arkansas, rendered on the 9th day of March, 1908, convicting him of drumming and soliciting business and patronage for a boarding-house, in contravention of the Act of the General Assembly of the State of Arkansas, entitled, "An Act for the Protection of Passengers and the Suppression of Drumming and Soliciting upon Railroad Trains and upon the Premises of Common Carriers," approved April 30th, 1907, your petitioner, the said Al Williams, hereby assigns the following errors:

First. By said statute and the conviction thereunder, your petitioner was deprived of his liberty and property in contravention of the Fourteenth Amendment to the Constitution of the United States.

Second. By said statute and the conviction thereunder, your petitioner has been deprived of the equal protection of the law, guaranteed to him by said amendment.

Your petitioner therefore prays that the said judgment of the Supreme Court of Arkansas, rendered on the 9th day of March, 1908, be reversed and set aside.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

[Endorsed:] Al Williams *v.* State of Arkansas. Assignment of Errors. Filed April 11, 1908. P. D. English, clerk, by W. P. Sadler, D. C.

29 Supreme Court of the United States.

AL WILLIAMS
vs.
STATE OF ARKANSAS.

To the Honorable Joseph M. Hill, Chief Justice of the Supreme Court of the State of Arkansas:

Your petitioner respectfully shows that on the 10th day of December, 1907, the State of Arkansas, through its Prosecuring Attorney for the Seventh Judicial Circuit, filed an information against your petitioner before a Justice of the Peace in Garland County, charging him with drumming and soliciting for business and patronage for his boarding-house on a train in said County, in violation of the Act of the General Assembly of the State of Arkansas, entitled, "An Act for the Protection of Passengers and the Suppression of Drumming and soliciting upon Railroad Trains and upon the Premises of Common Carriers," approved April 30th, 1907. That he was convicted before said Justice of the Peace, as will appear by a copy of said information and the judgment of said Justice, and fined the sum of Fifty Dollars ($50.00). That he appealed to the Circuit Court of said Garland County, where he was tried on the said 10th day of December, 1907, and the judgment of the Justice was affirmed. He then appealed to the Supreme Court of the State of Arkansas, contending that the statute aforesaid deprived him of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and that it deprived him of the equal protection of the law guaranteed to him by said amendment. Said Supreme Court, on the 9th day of March, 1908, sustained his conviction, holding that said statute did not deprive him of liberty or property without due
30 process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, and that it did not deprive him of the equal protection of the law secured to him by said amendment; all of which will appear by transcript of the proceedings in said cause, herewith presented.

Your petitioner respectfully represents that in this cause the validity of the Statute of the State of Arkansas was called in question on the ground of its being repugnant to the Constitution of the United States, and the decision thereon was in favor of the validity of said statute, and that in said proceeding rights, privileges and immunities were claimed under the Constitution of the United States, and the decision of the said Supreme Court of Arkansas was against the rights, privileges and immunities especially set up and claimed under such Constitution.

Your petitioner files herewith his assignment of errors, his prayer for reversal and his bond on writ of error, and prays that a writ of error be allowed to the Supreme Court of the United States to review

the said judgment of the Supreme Court of the State of Arkansas affirming his conviction under the statute hereinbefore referred to.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

[Endorsed:] Al Williams *v.* State of Arkansas. Petition for Writ of Error. Filed April 11, 1908. P. D. English, Clerk, by W. P. Sadler, D. C. Rose, Hemingway, Cantrell & Loughborough.

31 Whereas, the undersigned Al Williams has sued out a writ of error to the Supreme Court of the United States to reverse a judgment of conviction rendered against him by the Supreme Court of Arkansas on the 9th day of March, 1908, whereby a judgment of the Circuit Court of Garland County fining said Williams the sum of fifty ($50) dollars, was affirmed.

Now, therefore, the undersigned hereby undertake to the State of Arkansas, that the said Williams shall prosecute his writ of error, and if he fails to make his plea good, shall answer all damages and costs and perform the judgment of the said Supreme Court of the State of Arkansas and of the said Circuit Court of Garland County.

Witness our hands this 11th day of April, 1908.

A. H. WILLIAMS.
N. M. MOODY.

STATE OF ARKANSAS, *County of Garland:*

I solemnly swear that I am worth the sum of One Thousand ($1,000) dollars over and above all my just debts, liabilities and exemptions.

N. M. MOODY.

Subscribed and sworn to before me this 13th day of April, 1908.
[SEAL.] J. A. STALLCUP.

Approved:
JOS. M. HILL,
Chief Justice of the Supreme Court of the State of Arkansas.

Endorsed: Filed April 14, 1908. P. D. English, Clerk by W. P. Sadler, D. C.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Arkansas before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had on the said suit between The State of Arkansas and Al Williams wherein was drawn in question the validity of a treaty or statute of,

or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Al Williams as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein
33 to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, chief justice of the United States, the 11th day of April, in the year of Our Lord one thousand nine hundred and eight.

[The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.]

W. P. FEILD,
Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Allowed by
JOSEPH M. HILL,
Chief Justice of the Supreme Court of the State of Arkansas.

[Endorsed:] Filed April 11, 1908. P. D. English, Clerk By W. P. Sadler D. C.

34 UNITED STATES OF AMERICA, *ss:*

To the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Supreme Court of the State of Arkansas wherein Al Williams is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not

be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph M. Hill, Chief Justice of the Supreme Court of the State of Arkansas this 11th day of April, in the year of Our Lord one thousand nine hundred and eight.

JOSEPH M. HILL,
Chief Justice of the Supreme Court
of the State of Arkansas.

Service of the above citation is acknowledged.

STATE OF ARKANSAS,
By W. F. KIRBY,
Attorney General.

STATE OF ARKANSAS, *County of Pulaski, ss:*

On this — day of April, in the year of Our Lord one thousand nine hundred and eight, personally appeared George B. Rose before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to W. F. Kirby, Attorney General of the State of Arkansas, on this day.

—— ——.

Sworn to and subscribed the — day of —— A. D. 1908.

—— ——.

35 UNITED STATES OF AMERICA,
Supreme Court of Arkansas:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, in the City of Little Rock, this April 15, 1908.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk of the Supreme Court
of the State of Arkansas,
By W. P. SADLER,
Deputy Clerk.

Costs of Suit.

Defendant's Cost..	$73.90	Paid by Defendant.
Cost of Transcript.....	14.00	Paid by Defendant.

Endorsed on cover: File No. 21136. Arkansas supreme court. Term No. 733. Al Williams, plaintiff in error, *vs.* The State of Arkansas. Filed April 25, 1908. File No. 21136.

IN THE

Supreme Court of the United States

AL WILLIAMS,

v.

STATE OF ARKANSAS.

138

Appellant respectfully represents that this is a writ of error to the Supreme Court of Arkansas to review a judgment convicting appellant of drumming for custom for his boarding house upon a train in that State in contravention of a statute forbidding the owners of boarding houses and hotels from drumming for custom upon railroad trains and appellant seeks to have said act declared unconstitutional because it deprives him of his liberty and property without due process of law and denies him the equal protection of the law. As a criminal appeal from a state court, he prays that it be advanced and heard at an early date.

U. M. Rose,

W. E. Hemingway,

G. B. Rose,

J. L. Loughborough.

IN THE

Supreme Court of the United States

AL WILLIAMS,

vs. No. 733.

STATE OF ARKANSAS.

ON ERROR TO SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Information was filed against appellant for drumming for his boarding house on a railroad train going into Hot Springs. (Tr. p. 1.) He was tried before a justice of the peace and found guilty. (Tr. p. 3.) He appealed to the circuit court, where the cause was submitted to the court, sitting as a jury, and again convicted. (Tr. p. 4.) The bill of exceptions shows the following agreed statement of facts on which the case was submitted. (Tr. p. 5):

"The defendant has for six years been keeping a boarding house in the city of Hot Springs and was keeping the same on the 10th day of December, 1907, when he entered a train of the Little Rock & Hot Springs Western Railway Company while running in the County of Garland and State of Arkansas and solicited and drummed the passengers on said train to induce them to come to his said boarding house to board during their sojourn in said city; and said defendant was so engaged in drumming and soliciting upon said train when he was arrested. He had paid his fare as a passenger on said train, and was riding as such passenger while engaged in drumming and soliciting."

Defendant asked the following declarations of law:

"1. Upon the facts charged in the affidavit and upon the agreed statement of facts the defendant is not guilty of any criminal offense.

"2. The statute of the State of Arkansas under which the defendant is prosecuted deprives him of liberty and property without due process of law.

"3. Said statute deprives defendant of the equal protection of the law." (Tr. p. 5.)

These were refused and he excepted. (Tr. p. 5.)

He filed a motion for a new trial, saving all points (Tr. p. 6) and this being overruled, excepted and appealed to the Supreme Court of Arkansas. (Tr. p. 13.)

That court affirmed the judgment, and the defendant has sued out a writ of error to this court.

ARGUMENT.

Williams is the keeper of a boarding house in the city of Hot Springs. He was arrested for drumming on the train for his boarding house in contravention of the Act of April 30, 1907, which is as follows (Ark. Acts of 1907, p. 553):

"SECTION 1. That it shall be unlawful for any person or persons, except as hereinafter provided in section 2 of this Act, to drum or solicit business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, on the trains, cars, depots of any railroad or common carrier operating or running within the State of Arkansas.

Any person or persons plying or attempting to ply said vocation of drumming or soliciting, except as provided in section 2 of this Act, upon the trains, cars, depots of said railroads or common carriers, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty ($50) nor more than one hundred ($100) dollars for each offense.

"SECTION 2. That it shall be unlawful for any railroad or common carrier operating a line within the State of Arkansas knowingly to permit its trains, cars or depots within the State to be used by any person or persons

for drumming or soliciting business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon or other medical practitioner, or drumming or soliciting for any business or profession whatsoever; except, that it may be lawful for railroads or common carriers to permit agents of transfer companies on their trains to check baggage or provide transfers for passengers, or for persons or corporations to sell periodicals and such other articles as are usually sold by news agencies for the convenience and accommodation of said passengers.

And it shall be the duty of the conductor or person in charge of the train of any railroad or common carrier to report to the prosecuting attorney any person or persons found violating any of the provisions of this Act, and upon a willful failure or neglect to report any such person or persons known to be violating the provisions of this Act by drumming or soliciting said conductor or other person in charge of such train shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars.

"SECTION 3 For the purpose of enforcing the provisions of this Act, conductors, trainmen or special officers employed by railroads or common carriers are hereby required to forbid any violations of this Act; and, if necessary, they are authorized to call an officer at such place where such officer can be had, and to report a violation of this Act to such officer, whose duty it shall be to arrest the person charged with violating this Act and to carry him

immediately before some officer to be tried according to law.

"SECTION 4. That all Acts and parts of Acts in conflict herewith are hereby repealed, and this Act to take effect and be in force from and after its passage."

This appeal is taken to test the constitutionality of that Act on the ground that it deprives the appellant of the liberty and the equal protection of the laws guaranteed by the Fourteenth Amendment.

THE ACT DEPRIVES APPELLANT OF HIS CONSTITUTIONAL LIBERTY.

We will first consider it as an unlawful restriction upon the liberty of the citizen. It has been often declared that the guaranty of life, liberty and the pursuit of happiness, secures to the citizen the right to pursue any calling not injurious to the public and to protect him against all interference with his business not in the lawful exercise of the police power. It has also been repeatedly held that the police power is limited to those things essential to the safety, health, comfort and morals of the community, and that any enactments seeking to restrict the liberty of a citizen in matters that do not fall within the scope of the police power as thus defined, are unconstitutional and void.

All the cases emphasize the right of the citizen to earn his livelihood by the pursuit of any lawful calling. The occupation of drumming or soliciting for legitimate forms of business is not merely a lawful calling, but it is

one of the most important of all in this country, and one which provides a subsistence for hundreds of thousands, and perhaps millions, of our population. In this particular instance, the appellant is earning his livelihood by drumming and soliciting for his own boarding house. The majority of those engaged in that calling however are in the employ of others and they all stand exactly in the attitude of men who drum for commercial establishments. The business of feeding and sheltering travelers is as essential to the public as the business of clothing them, or any other business that can be pursued. The men who drum for boarding houses and hotels are pursuing a vocation which has always been considered lawful, and one which has no doubt flourished ever since the first tavern was set up by the roadside. It is an occupation as much protected by the Constitutional Amendment as any other; but if this act is constitutional, a large part of the citizens of Hot Springs are thrown out of employment and deprived of the means of earning a support.

This is not a case of an occupation tax. Drummers for hotels and boarding houses are not taxed; they are forbidden altogether to exercise their callings.

In *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 757, Mr. Justice Field said:

"Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, *by which is meant the right to pursue any law-*

ful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.

"It has been well said that, 'The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' Adam Smith's Wealth of Nations, Bk. I, Chap. 10."

In *Mugler v. Kansas*, 123 U. S. 623, Mr. Justice Harlan said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In *Lawton v. Steele*, 152 U. S. 137, Mr Justice Brown said:

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose ususual and unnecessary restrictions upon lawful occupations.* In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In *Allgeyer v. Louisiana*, 165 U. S. 589, Mr. Justice Peckham said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; *to earn his livelihood by any lawful calling; to pursue any livelihood or avocation*, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In *Lochner v. New York*, 198 U. S. 57, in which an act prohibiting bakers to work more than ten hours a day was held to be an unjustifiable interference with the liberty of the citizen, Mr. Justice Peckham stated:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the Legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a

mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.

"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hourse of labor, in the occupation of a baker. * * * Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.

"It is a question of which of two powers or rights shall prevail—the power of the State to legislate, or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

The principles announced by this court have been applied by the State courts in a variety of cases, of which the following are examples:

Bassett v. People, 193 Ill. 334, 62 N. E. 219, 220.

Bailey v. People, 190 Ill. 28.

People v. Gillison, 98 N. Y. 108, 17 N. E. 343.

Ritchie v. People, 155 Ill. 88, 40 N. E. 454.

Ex parte *Jacobs*, 98 N. Y. 105.

Ex parte *Whitewell*, 98 Cal. 73, 32 Pac. 872.

People v. Beattie, 89 N. Y. Supp. 193.

State v. Peel Splint Coal Company, 36 W. Va. 856.

State v. Goodwill, 33 W. Va. 179.

Bracewell v. People, 147 Ill. 66.

People v. Warden, 157 N. Y. 116, 51 N. E. 1006.

Judge Hare in his American Constitutional Law, Vol. II, p. 777, says:

"Civil liberty does not simply mean that the citizen shall be exempt from servitude and incarceration; it implies that he shall be free in the choice and exercise of his calling or profession and to follow any way of life that is not at variance with the rules of morals and good order generally observed among civilized nations."

Judge Cooley in his Constitutional Limitations, Sixth Edition, p. 738, defines the occupations which are subject to the police power as follows:

"In the following cases we should say that property in business was affected with the public interest: 1. Where the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc., of keeping billiard-tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll-bridges, etc. 2. Where the State, on public grounds, renders to the business special assistance, by taxation or otherwise. 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases."

II.

RIGHT TO SOLICIT AS INCIDENT TO BUSINESS.

It may be claimed that this act merely prevents the appellant from soliciting custom for his boarding house, and that it does not interfere with his right to conduct it. That, however, is a mere begging of the question. No one keeps boarders for pleasure, though decayed gentlefolks sometimes claim that they do. The only purpose of keeping a boarding house is to make money, and the boarding house without boarders is an unprofitable possession. If you can not solicit custom for your business you may, unless you are peculiarly placed, as well retire.

There was never a more iniquitous act than this. It is burdensome alike upon the keepers of boarding houses and upon the public. Its origin is easily to be perceived. The proprietors of the great hotels which are known throughout the land by this means destroy all competition. The stranger who comes to Hot Springs, with no more than the general information, is compelled to go to one of the large hotels of which he has heard, and to remain there at least until he can look around and find less expensive quarters. Boarding houses which have been long in operation and which have established a reputation, also profit by it. It is however, absolutely destructive to that competition which is the life of trade, and for the preservation of which our national government and the governments of all the States are now making such tremendous exertions.

Under this law it is practically impossible to establish a new boarding house or a small hotel. If the proprietor can not go upon the trains, meet the visitors coming to the city and explain to them the merits of his place, they will become established in old and well known hostelries from which he will find it impossible to illure them. The act should be entitled "An act to enable the large hotels and the old and established boarding houses of the city of Hot Springs to monopolize the business of entertaining guests."

The right to advertise a business and to solicit custom is an essential incident, and so essential that if it is denied the business must perish, unless it be a mere cor-

ner grocery or cigar stand. Therefore, it has always been held that the right to solicit is inseparably attached to the right to do business.

The leading case on this subject is *Robbins v. Shelby Taxing District*, 120 U. S. 489, where the city of Memphis undertook to tax the drummers who did business within its borders. It was there contended that the right to do business did not involve the right to enter the territory of another State and solicit custom there. But Mr. Justice Bradley said:

"In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State, before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? What shall the merchant or manufacturer do, who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

"The only way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such State for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things.

"It may be suggested that the merchant or manufacturer has the postoffice at his command, and may solicit orders through the mails. We do not suppose, however, that anyone would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the State. Besides, why could not the State to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way?

"The truth is that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself, or by some one employed by him for that purpose."

This opinion has been approved in *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 143; *Brennan v. Titusville*, 153 U. S. 289; *McCall v. California*, 136 U. S. 104; *Caldwell v. North Carolina*, 187 U. S. 622;

Gunn v. White Sewing Machine Co., 57 Ark. 24; *Hurford v. State*, 91 Tenn. 673, 20 S. W. 201; *Coit v. Scott*, 98 Tenn. 258, 39 S. W. 1; *Clements v. Casper*, 9 Wyo. 497, 35 Pac. 473; *Overton v. State*, 70 Miss. 559, 13 So. 227; *Pegues v. Ray*, 50 La. Ann. 579, 23 So. 904; *McLaughlin v. South Bend*, 126 Ind. 472, 26 N. E. 185; *Bloomington v. Bourland*, 137 Ill. 536, 27 N. E. 692; *Toledo Com. Co. v. Glenn Mfg. Co.*, 55 Ohio St. 222, 45 N. E. 197; *Mershon v. Pottsville Lumber Co.*, 187 Pa. St. 16, 40 Atl. 1018; *Simons Hdw. Co. v. McGuire*, 39 La. Ann. 850, 2 So. 592; *State v. Agee*, 83 Ala. 112, 3 So. 856; *Stratford v. Montgomery*, 110 Ala. 626, 20 So. 129; *State v. Bracco*, 103 N. C. 350, 9 S. E. 404; *Wrought Iron Range Co. v. Johnson*, 84 Ga. 758, 11 S. E. 233; *Emmons v. Lewiston*, 132 Ill. 382, 24 N. E. 58; *State v. Rankin*, 11 S. Dak. 148, 76 N. W. 299; *Ames v. People*, 25 Col. 511, 56 Pac. 725; *Ex parte Rosenblatt*, 19 Nev. 441, 14 Pac. 298; *Fort Scott v. Pelton*, 39 Kan. 766, 18 Pac. 954; *State v. Hickox*, 64 Kan. 654, 68 Pac. 35; *Talbutt v. State*, 39 Tex. Crim. 65, 44 S. W. 1091; *French v. State*, 42 Tex. Crim. 224, 58 S. W. 1015; *State v. Hanaphy*, 117 Iowa 18, 90 N. W. 601; *Adkins v. Richmond*, 98 Va. 101, 34 S. E. 967; *Stone v. State*, 117 Ga. 296, 43 S. E. 740; *Commonwealth v. Pearl Laundry Company*, 49 S. W. 28; *Wagner v. Meakin*, 92 Fed. 76; *In re* Tinsman, 95 Fed. 648; *In re* Kimmel 41 Fed. 775; *In re* Houston, 47 Fed. 539; *In re* Mitchell, 62 Fed. 576; *In re* Hough, 69 Fed. 330; *Ex parte Loeb*, 72 Fed. 657; *Louisiana v. Lagarde*, 60 Fed. 186; *Ex parte Green*, 114 Fed. 959.

In perhaps the last utterance upon this subject, *Delamater v. South Dakota*, 205 U. S. 100, Mr. Justice White said:

"Of course if the owner of the liquor in another State had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that *the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell*, which could not be burdened without directly affecting interstate commerce."

In the *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, where an act prohibiting solicitation by cards or posters upon the public streets was held to be void, the court said:

"Laws which attempt to regulate and restrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty. Under our constitution and system of government the object and aim is to leave the subject entire master of his own conduct, except in the points wherein the public good requires some direction or restraint. What direction or restraint is required for the public good in the mere act of giving away an advertising card or hand bill?"

III.

SOLICITING ON RAILROADS.

It may be contended that this statute can be justified on the principle that it applies only to persons traveling upon railroads. Such a contention would be based upon an entirely erroneous assumption. It is true that railroads exercise public functions which subject them to the operation of the police power. They are creatures of the State, permitted to exist for public purposes, and subject to State regulation.

It is not true, however, that the passenger who avails himself of their services surrenders his liberty as a citizen. Every man who is not drunk or afflicted with a contagious disease has a right, upon paying the fare, to enter their coaches, and when there, he is no more to be deprived of his liberty than when in any other public place. The paying of his fare gives him the right to ride, and when he rides there is no power in the State to prevent his talking, unless his language is blasphemous or obscene. The State can not prescribe on what subject he may talk, but he may talk with any fellow passenger who will listen to him, upon any subject that pleases him; and one of the subjects about which men most naturally talk is their own business. You can no more prohibit a man talking, or prescribe the subjects upon which he shall talk, on a railroad train, than you can in the streets of a city. It is even established by the numerous cases we have cited that

you can not prevent him entering the places of business of other people to solicit their custom, so long as the owner himself does not eject him. Freedom of speech is guaranteed by our constitution. To say that a man who has paid his fare and is lawfully upon a railroad or other public conveyance, can not open his mouth in reference to his own business, would be to establish a tyranny of a character analogous to the Spanish Inquisition, and far more hateful, for it would not have the excuse of religious conviction. The freedom of speech is a right for which men of English descent have fought with more pertinacity than for any other. With their political instinct, they have realized that without this right, all others must perish. And the proposition that because a man operates a hotel or boarding house he must, when he enters a train, confine his conversation to subjects in which he is not interested, and that he can not speak to his fellow passengers about those in which he is most concerned and which are closest to his heart, is a monstrosity.

An effort may be made to justify the act on the ground that it tends to secure the comfort of other passengers. This, however, is utterly untenable. Half of the conversations addressed to one are a bore, and one would rather be left to the communion of his own thoughts; but so long as the person speaking will refrain from profanity and indecency, the victim has no remedy but to ask the offender to desist or to leave him. Of all nuisances, the book-agent is perhaps the worst. He rarely has anything that

you want, and he importunes you to buy in the hope that in utter weariness you will succumb. The lightning-rod agent is a visitor equally undesirable. Yet, in the cases which we have cited, it has been held that the police power does not extend so far as to enable the State to repress these annoyances.

The book-agent, the lightning-rod agent and a great number of other soliciting agents consume one's time in talking about something in which the listener, in all likelihood, has no interest. But every person going to Hot Springs is deeply interested in securing a comfortable place at which to stay and good food to eat; and all except the favored few, are also concerned in getting these at the most reasonable price. It is therefore to their advantage that as many solicitors as possible should enter the trains, explain the facilities and comforts that they have to offer, and compete with one another in prices. Without this free competition the traveler is compelled to go to the old and established hostelries with which he is acquainted by public report, and to pay the higher prices which such places of entertainment are in a position to exact. Therefore, instead of administering to the comfort of the passengers, as this act pretends to do, it really does them a great injury, compelling them to enter a strange city with knowledge only a few places of entertainment, and those the most expensive. If the traveler has made up his mind where he desires to go, he can readily free himself from the importunities of those solicitors by saying so; and if

he has not made up his mind, he is interested in what they have to say, and his comfort is enhanced by the information which he thus obtains.

Judge Cooley says in his work on Constitutional Limitations, Sixth Edition, pp. 510-518:

"The first amendment to the Constitution of the United States provides, among other things, that Congress shall make no laws abridging the freedom of speech or of the press. The privilege which is thus protected against unfriendly legislation by Congress, is almost universally regarded not only as highly important, but as being essential to the very existence and perpetuity of free government. The people of the States have therefore guarded it with jealous care, by provisions of similar import in their several Constitutions, and a constitutional principle is thereby established which is supposed to form a shield of protection to the free expression of opinion in every part of our land.

"It is to be observed of these several provisions, that they recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged, or that they shall remain inviolate. They do not assume to create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed. We are at once, therefore, turned back from these provisions to the pre-existing law, in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they undertake to assure."

"The constitutional liberty of speech and of the press as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

When in pursuance to this principle we look to the common law, we find that to solicit a person's patronage for a hotel or boarding house was not a crime, and therefore it is not within the power of the Legislature to make such use of the right of free speech an offense.

IV.

THE ACT ALSO DEPRIVES THE CITIZEN OF THE EQUAL PROTECTION OF THE LAW.

The act applies only to the keepers of hotels, lodging, eating and bath houses, among pursuits open to all the

world. It applies also to medical practitioners; but as their vocation is one which concerns the public health and which is not pursued as of right, but only by leave of the State, they are legitimately subject to police regulation, and for the purposes of this case, they may be dismissed from our consideration.

Acts which single out one class of citizens and impose upon them burdens or restraints not imposed upon others, can only be justified by inherent differences. If they are merely arbitrary, they deny to the citizen the equal protection of the law which is guaranteed by the Fourteenth Amendment. Now, there is nothing in the character of a lodging house or hotel keeper that should preclude them from seeking by proper solicitation the extension of their business. In that business there is nothing harmful to the health, morals or safety of the community; they discharge not merely a useful, but an indispensable function. But for them the traveler must go without shelter; but for them, the healing waters which make Hot Springs one of the great health resorts of the world, would flow in vain. Yet they are singled out, and they alone are deprived of the only efficient method of conducting their enterprises.

If a man starts up in any other trade, he may by proper solicitation inform all persons interested of the business upon which he has embarked, and he is free to use all his persuasive powers to secure their custom. The man, however, who opens a new hotel or boarding house in Hot Springs, must, if this act is suffered to stand, find himself

predestined to failure, unless his establishment be of so magnificent a character as to attract the notice of the public prints and be called to the attention of the world as a matter of general interest.

As this court said in the Robbins case, personal solicitation is the only efficient way of extending one's business operations; and while that is allowed to all other men conducting legitimate enterprises, it is denied to the appellant and to others engaged in like avocations.

In the case of *Yick Wo v. Hopkins*, 118 U. S. 368, where the shield of the Federal Constitution was raised above the ill-treated Chinese, Mr. Justice Field used those memorable words, which have become axiomatic in constitutional jurisprudence, but which can never be repeated too often, "The equal protection of the laws is a pledge of the protection of equal laws." Rarely has so much been said in so few words, or said so well; and as long as they are kept in mind by the courts, the citizen is secure against factious abuse of legislative power.

The constitutional provision is supremely just and beneficent, and it should receive a liberal construction. Class legislation is the great danger of republics, and the rock on which most of them have split. Some faction has got into power, and has passed laws so oppressive to its opponents that they have sought relief in a despotism that would bear alike on all.

The requirement of equal laws does not, of course, exclude classification. The vocations of men being infinitely multiplex, laws which would be just to one would be ruinous to another. So occupations may be classified, and laws enacted to govern the respective classes. But the classification must not be arbitrary. It must be based on reason. Save in cases where, as with the sale of liquor, the police power comes in with its almost unlimited authority to protect the lives, health and morals of the community, no individual or class of individuals, natural or artificial, can be arbitrarily selected as the recipients of special privileges or subjected to special burdens.

This court has always vigorously upheld this principle. Thus, in *Gulf, Colorado & Santa Fe Ry. v. Ellis,* 165 U. S. 150, where the act provided for taxing an attorney's fee against a railroad in actions for stock killed, Mr. Justice Brewer said:

"But it is said that it is not within the scope of the Fourteenth Amendment, to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While as a general proposition this is undeniably true; * * * yet it is equally true that such classification *can not be made arbitrarily.* The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall alone be subjected, or all men

possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. *That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.*"

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, *but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary selection.*"

In *Atchinson, Topeka & Kansas Railroad v. Matthews*, 174 U. S. 96, an act providing for a like attorney's fee was sustained in cases of fires started by locomotives; but this was placed on the ground that the danger attending fires brought the matter within the scope of the police power. In that case, however, Justice Brewer stated the general principle as strongly as in the former, saying:

"It (the Legislature) *can not pick out one individual or one corporation*, and enact that whenever he or it is sued that the judgment shall be for double damages, or subject to an attorney's fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or

corporations which is purely arbitrary, and *impose upon such class special burdens and liabilities.* Even when the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

Long before this, in the Railroad Tax Cases, 13 Fed. 733, Mr. Justice Field on circuit had said:

"*It not only implies the right of each to resort on the same terms with others to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed on all others under like circumstances.*"

Mr. Justice Catron while on the Supreme Court of Tennessee in *Walley's Heirs v. Kennedy*, 2 Yerger, 554; 24 Amer. Dec. 512, said:

"What is 'the law of the land?' This court, on two occasions, and upon the most mature consideration, has declared the clause, 'law of the land,' means a general public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial, or private law, which directly proposes to destroy or affect individual rights, or does the same thing

by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporate bodies would be governed by one law, the mass of the community, and those who made the law, by another; whereas a like general law, affecting the whole community equally, could not have been passed."

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, a statute was passed regulating stock yards doing a certain amount of business, and as there was only one corporation in the State whose business reached the required volume, it was held that the statute denied to it the equal protection of the law.

So, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 555, the anti-trust act of Illinois excepted from its provisions agricultural products or livestock while in the hands of the producer or raiser; and it was held that this exception in favor of a particular class deprived those who remained within its provisions of the equal protection of the law.

See also,

State v. Conlon, 65 Conn. 478, 33 Atl. 521.

Millett v. People, 117 Ill. 294, 7 N. E. 635.

Ritchie v. People, 155 Ill. 88, 40 N. E. 456.

Frorer v. People, 141 Ill. 171, 31 N. E. 397.

Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 63.

In *Dobbins v. Los Angeles,* 195 U. S. 236, Mr. Justice Day says:

"It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determine whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

This court has of late refused to set aside a number of State laws on the ground that they were in conflict with the equality clause; and the idea has gained ground that it is disposed to recede from the position taken in the Ellis case. A reading of those decisions, however, does not make that impression on our minds. The Ellis decision aroused fallacious hopes, and many suits have been brought to this court that were not within its legitimate scope. This court has merely held that the acts which it refused to set aside did not deny the equal protection of the law to the complaining party; but in each case it has reiterated the principles of the Ellis case. It seems to us, however, that the

case now presented shows an oppressive and inexcusable violation of the equality clause, and that the act should be held unconstitutional in so far as it applies to keepers of boarding houses.

Respectfully,

U. M. Rose,

W. E. Hemingway,

G. B. Rose,

D. H. Cantrell,

J. P. Loughborough,

No. 138.

IN THE

Supreme Court of the United States

AL WILLIAMS, PLAINTIFF IN ERROR,

vs.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

ON ERROR TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR DEFENDANT IN ERROR

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IN THE

Supreme Court of the United States.

AL WILLIAMS, PLAINTIFF IN ERROR,

vs. No. 733.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

ON ERROR TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF CASE.

This proceeding is brought to review the judgment of the Supreme Court of Arkansas (85 *Ark.* 465) affirming a conviction of the plaintiff in error for violating a statute of the State of Arkansas, entitled, "An Act for the protection of passengers, and for the suppression of drumming and soliciting upon railroad trains and upon the premises of common carriers," approved April 30, 1907.

The Act provides:

"Section 1. That it shall be unlawful for any person or persons, except as hereinafter provided in section 2 of this Act, to drum or solicit business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, on the trains, cars, depots of any railroad or common carrier operating or running within the State of Arkansas.

"Any person or persons plying or attempting to ply said vocation of drumming or soliciting, except as provided in section 2 of this Act, upon the trains, cars, depots of said railroads or common carriers, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty ($50) nor more than one hundred dollars ($100) for each offense.

"Section 2. That it shall be unlawful for any railroad or common carrier operating a line within the State of Arkansas knowingly to permit its trains, cars or depots within the State to be used by any person or persons for drumming or soliciting business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon or other medical practitioner, or drumming or soliciting for any business or profession whatsoever; except, that it may be lawful for railroads or common carriers to permit agents of transfer companies on their trains to check baggage or provide transfers for passengers, or for persons or corporations to sell periodicals and such other articles as are usually sold by news agencies for the convenience and accommodation of said passengers.

"And it shall be the duty of the conductor or person in charge of the train of any railroad or common carrier to report to the prosecuting attorney any person or persons found violating any of the provisions of this Act, and upon a wilful failure or neglect to report any such person or persons known to be violating the provisions of this Act by drumming or soliciting said conductor or other person in charge of such train shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars.

"Section 3. For the purpose of enforcing the provisions of this Act, conductors, trainmen or special officers employed by railroads or common carriers are hereby required to forbid any violations of this Act; and, if necessary, they are authorized to call an officer at such place where such officer can be had, and to report a violation of this Act to such officer, whose duty it shall be to arrest the person charged with violating this Act and to carry him

immediately before some officer, to be tried according to law.

"Section 4. That all Acts and parts of Acts in conflict herewith are hereby repealed, and this Act to take effect and be in force from and after its passage."

The case was tried upon the following agreed statement of facts:

"The defendant has for six years been keeping a boarding house in the city of Hot Springs and was keeping the same on the 10th day of December, 1907, when he entered a train of the Little Rock and Hot Springs Western Railway Company while running in the County of Garland and State of Arkansas, and solicited and drummed the passengers on said train to induce them to come to his said boarding house to board during their sojourn in said city; and said defendant was so engaged in drummng and soliciting upon said train when he was arrested. He had paid his fare as a passenger on said train, and was riding as such passenger while engaged in drumming and soliciting."

The plaintiff in error, objecting to the judgment, challenges the act as unconstitutional, claiming that it deprives him of liberty and property without due process of law, and also of the equal protection of the law, guaranteed by the Fourteenth Amendment.

ARGUMENT.

THE STATUTE IS A POLICE REGULATION AND CLEARLY WITHIN THE POWER OF THE STATE.

The State has the inherent power to make all laws necessary for the protection of the health, safety, morals and comfort of its citizens and to promote the public convenience and general welfare.

The rights of property and liberty even, guaranteed by the constitution against deprivation without due process of law, are subject to such reasonable restraints under the police power as the common good or general welfare may require. It is within the province of the legislature to declare the public policy and it has broad discretion to determine what the public interests require and what measures are necessary for their protection. It is true the legislative determination is not final and is subject to judicial review as being unreasonable and arbitrary, but as this court has said "some play must be allowed for the joints of the machine, and it must be remembered that legslatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Now if there existed a condition of affairs about which the legislature exercising its right to enact laws for the protection of the health, safety, comfort or welfare of the people might pass the law, it must be sustained, but if such

action was arbitrary interference with the right to contract, solicit or carry on business and having no just relation to the protection of the public within the scope of the legislative power the act must fail.

The purpose of the act is apparent. It was to promote the comfort of the public traveling upon railroad trains in the State, and especially of passengers journeying to Hot Springs, where the halt, the lame, the sick and diseased of the earth, pain-laden, come to seek relief from their burden of suffering, in the justly world-famed healing waters, and protect them from annoyance from the insistent, harassing, persistent and continuous solicitations and importunities of the pestiferous drummer who made himself an insufferable nuisance.

The legislative intent is definitely and clearly expressed in the title:

"An Act for the protection of passengers and for the suppression of drumming and soliciting upon railroad trains and upon the premises of common carriers."

The law did not allow the passenger to resort to force, if he were able and cared to, to protect himself against this talking nuisance, he was not permitted to abate it by throwing the obnoxious drummer from the train, nor could he escape it by leaving the moving train himself, neither would an action for damages against the railroad provide any adequate relief. The act was necessary, was

within the power of the lawmaking body and is a wholesome regulation.

There are innumerable cases relating to the scope and limits of the police power of a State, but we think that reference to a few of the more recent important ones will suffice for this inquiry.

In the late case of *McLean vs. State of Arkansas,* 211 *U. S.,* 546, holding valid a statute making it unlawful for mine owners, employing ten or more men underground in mining coal and paying therefor by the ton mined, to screen the coal before it was weighed, the court discussing the police power, said:

"In *Gundling vs. Chicago,* 177 *U. S.,* 183, this court summarized the doctrine as follows:

" 'Regulations respecting the pursuit of a lawful trade or business are of frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary interfered with or destroyed, without due process of law, they do not extend beyond the power of the State to pass and they form no subject for Federal interference.'

"In *Jacobson vs. Massachusetts,* 197 *U. S.,* 11, this court said:

" 'The liberty secured by the constitution of the United States to every person within its jurisdiction, does not import absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints. It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health and welfare of the people. * * * *

"The legislature being familiar with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.

" '*Jacobson vs. Massachusetts,* 197 *U. S.,* 11.
" '*Mugler vs. Kansas,* 123 *U. S.,* 623.
" '*Minnesota vs. Barber,* 136 *U. S.,* 313, 320.
" '*Atkins vs. Kansas,* 191 *U. S.,* 207, 223.

" 'If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare, it is not to be set aside, because the judiciary may be of opinion that the act may fail of its purpose or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government.' "

In *Adair vs. United States,* 208 *U. S.,* 172, the court in declaring the act of Congress, making it a criminal offense for a carrier engaged in interstate commerce to discharge an employe because of his membership in a labor organization, unconstitutional as an invasion of the personal liberty as well as the right of property guaranteed by the Fourteenth Amendment, used this language:

"Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor, each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good.

"This court has said that:

"In every well ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint to be enforced by reasonable regulations, as the safety of the general public may demand. *Jacobson vs. Massachusetts,* 197 *U. S.*, 29." * * * * *

And quoting from *Lochner vs. New York,* 198 *U. S.,* 45, 53, 56, which involved the validity of a statute prescribing certain maximum hours for labor in bakeries:

"There are, however, certain powers existing in the sovereignty of each State in the Union somewhat vaguely termed 'police powers,' the exact description and limitation of which have not been attempted by the courts. Those powers broadly stated, and without at present any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

"*Mugler vs. Kansas,* 123 *U. S.*, 623.
"*In re Kemmler,* 136 *U. S.*, 436.
"*Crowley vs. Christenson,* 137 *U. S.*, 86.
"*In re Converse,* 137 *U. S.*, 624."

In *Chicago, Burlington & Quincy Ry. vs. Drainage Commissioners*, 200 *U. S.*, 584, the court holding a statute providing for draining large bodies of land valid as a proper exercise of the police power, said:

"We refer also, as having direct application here, to some of the cases familiar to the profession, that recognize the possession by each state of the power never surrendered to the government of the Union, of guarding and promoting the public interests by reasonable police regulations that do not violate the constitution of the State or the constitution of the United States.

> *"Gibbons vs. Ogden*, 9 *Wheat.*, 1.
> *"Railroad Co. vs. Husen*, 95 *U. S.*, 465.
> *"Patterson vs. Kentucky*, 97 *U. S.*, 501, 503.
> *"Morgan vs. Louisiana*, 118 *U. S.*, 455, 464.
> *"Hennington vs. Georgia*, 163 *U. S.*, 299, 308, 309.
> *"N. Y., N. H. & H. Railroad Co. vs. New York*, 165 *U. S.*, 628, 631. * * * *

"We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.

> *"Lake Shore & Michigan South Ry. vs. Ohio*, 173 *U. S.*, 285, 292.
> *"Gilman vs. Philadelphia*, 3 *Wall*, 713, 729.
> *"Pound vs. Turck*, 95 *U. S.*, 459, 464.
> *"Railroad vs. Husen*, 95 *U. S.*, 470."

Counsels' contention that the statute transcends the limits of the State's police power is well answered in the opinion in *Bacon vs. Walker*, 204 *U. S.*, 311, a case which involved the validity of a statute of Idaho, prohibiting the herding and grazing of sheep within two miles of the dwelling house of the owner of a possessory claim on the public domain. The court, in reply to a like contention of counsel, said:

"It is enough to say that they have fallen into the error exposed in *Chicago, Burlington & Quincy Railway Co. vs. Drainage Commissioners*, 200 *U. S.*, 561, 592. In that case we rejected the view that the police power cannot be exercised for the general well being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter therefore into the discussion whether the sheep industry is legitimate and not offensive, nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision that expresses the limit. * * * * The power is not confined as we have said to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people."

See, also:

Ohio Oil Co. vs. Indiana, 177 *U. S.*, 190.

Clark vs. Nash, 198 *U. S.*, 361.

Strickley vs. Highland Boy Gold Mining Co., 200 *U. S.*, 527.

Offield vs. N. Y., N. H. & H. Railroad Co., 203 *U. S.*, 372.

Plessy vs. Ferguson, 163 *U. S.*, 537.

This last case involved the validity of the "separate coach" law of Louisiana, requiring equal but separate accommodations for white and colored passengers, and the court sustained it, using the following language:

"So far then as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.

"In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and order."

Railroads are vast enterprises, great highways of commerce, public highways, that are permitted to be organized and exist for the public convenience and benefit and are subject to such regulation as the public good may require.

In *Donovan vs. Pennsylvania Co.*, 199 *U. S.*, 279, 293, 296, this court, quoting from *Cherokee Nation vs. Kansas Railway Co.*, 641, 651, said:

"The question is no longer an open one as to whether a railroad is a public highway established primarily for the convenience of the people and to subserve public ends and therefore subject to governmental control and regula-

tion." * * * * And continuing, "To the same effect are *United States vs. Freight Association*, 166 *U. S.*, 290, 332; *Smythe vs. Ames*, 169 *U. S.*, 466, 544; *Lake Shore, etc., Ry. vs. Ohio*, 173 *U. S.*, 285, 301.

"Necessarily, the same principles apply in reference to the use of the company's station house and depot grounds; for they are held in the same right as its road; its locomotives and other property or appliances employed in the transportation of passengers and freight and must be devoted primarily to public use, to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway. * * * *

* * * * "In maintaining a highway under the authority of the State, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law."

By the general law, because of their condition and necessary virtual confinement in the train, carriers are bound to use all such reasonable precautions as human judgment and foresight are capable of, to make their passengers' journeys safe and comfortable and not only may, but must remove persons who would cause injury or annoyance to other passengers.

They have been compelled by statutes, to establish depots and stations, to furnish equal but separate accommodations for the white and colored races upon their trains, and separate waiting rooms at their depots and to require each passenger to occupy the places designated according to his race, to keep their trains lighted and comfortably

heated and supplied with ice water at all proper times, as well as their depots and station houses, all for the comfort of the passengers, and this statute viewed as a regulation of the railroads is valid and but a reasonable exercise of the police power to further promote the comfort of the traveling public.

The hotel drummer and backman have long been regarded as belonging to that class of persons whose occupation or business may be regulated for the public good and the railroad companies themselves have the right to prohibit drumming or soliciting for hotels, boarding houses and hack lines upon their trains and depot platforms.

St. Louis, I. M. & S. Ry. vs. Osborn, 67 *Ark.*, 399.

Landrigan vs. State, 31 *Ark.*, 51

Lindsay vs. Anniston, 104 *Ala.*, 261.

Donovan vs. Pennsylvania Co., 199 *U. S.*, 279.

McQuillan on Municipal Ordinances, Secs. 28, 184.

In *Emerson vs. McNeil*, 84 *Ark.*, 552, the court held valid a town ordinance prohibiting drumming or soliciting for hotels, hack lines, etc., upon depot platforms, saying:

"Section 5438 of Kirby's Digest confers upon cities and incorporated towns the power 'to regulate drumming or soliciting persons who arrive on trains or otherwise, for hotels, boarding houses, bath houses or doctors.' Section 5454 empowers them 'to regulate all carts, wagons, drays, hackney, coaches, omnibuses and ferries and every descrip-

tion of carriages which may be kept for hire, and all livery stables,' and 'to regulate hotels and other houses for public entertainment.' Under these powers the municipality had the right to pass the ordinance in question.

"*Fayetteville vs. Carter*, 52 *Ark.*, 301.
"*Hot Springs vs. Curry*, 64 *Ark.*, 152.

"And the power conferred and exercised is not obnoxious to, or an interference with any common right, but is a proper exercise of the police power and is universally sustained.

"*McQuillan on Municipal Ordinances, Secs.* 28, 184.
"*St. Paul vs. Smith*, 27 *Minn.*, 364.
"*Veneman vs. Jones*, 118 *Ind.*, 41."

The legislature found this evil, that the cities and towns had been given power to regulate, had spread beyond the depots and platforms of the railroads and the jurisdiction of the towns and extended to the trains, to the great annoyance and discomfort of the traveling public, and passed this law to remedy the evil. It is not unreasonable nor arbitrary, does not deprive plaintiff of his liberty unduly, has direct relation to the object sought to be accomplished, is within the power of the State and valid as the court declared it in this language:

"The legislature clearly has the power to make regulation for the convenience and comfort of travelers on railroads, and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importuni-

ties of drummers. It is suggested in argument that the statute was especially aimed at the protection of travelers to the city of Hot Springs. If this be so, we can readily see additional reason why the regulation is a wholesome one. A large percentage of those travelers are persons from distant States, who are mostly completely strangers here, and many are sick. Drummers who swarm through the trains soliciting for physicians, bath houses, hotels, etc., make existence a burden to those who are subjected to their repeated solicitations. It is true that the traveler may turn a deaf ear to these importunities, but this does not render it any the less unpleasant and annoying. The drummer may keep within the law against disorderly conduct, and still render himself a source of annoyance to travelers by his much beseeching to be allowed to lead the way to a doctor or a hotel.

"It is also argued that the act, literally construed, would prevent any person of the classes named from carrying on a private conversation on a train concerning his business. This is quite an extreme construction to place upon the statute, and one which the legislature manifestly did not intend. We have no such question, however, before us on the facts presented in the record.

"This statute is not an unreasonable restriction upon the privilege one should enjoy to solicit for his lawful business, which, it is rightly urged, is an incident to any business. It does not prevent any one from advertising his business or from soliciting patronage except upon trains, etc. This privilege is denied him for the public good. It is a principle which underlies every reasonable exercise of the police power that private rights must yield to the common welfare."

Williams vs. State, 85 *Ark.*, 470.

Such of the cases cited by plaintiff in error as are not in harmony with the view of the case here insisted upon are not applicable nor in point herein and especially is this

true of the case of *Robbins vs. Shelby Taxing District*, 120 *U. S.*, 489, and the page and a half of citations in which counsel say the opinion therein has been approved. That was a case holding that a State had no right to lay burdens upon interstate commerce by taxing drummers engaged therein. There is no question of interstate commerce nor interference therewith involved here. In reply to that part of their brief we might cite at random the authorities ranged upon the shelves in the north three sections of the State or the United States Supreme Court library and rely with confidence upon some of them being more nearly in point.

THE ACT DOES NOT DENY PLAINTIFF THE EQUAL PROTECTION OF THE LAW.

The objection that the act discriminates against plaintiff and denies him the equal protection of the law is without foundation. The State has the power of classification in legislation, and as this court has said, "may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion."

Magoun vs. Illinois Trust & Savings Bank, 170 *U. S.*, 283.

Farmers & Merchants Ins. Co. vs. Debney, 189 *U. S.*, 301.

Orient Ins. Co. vs. Daggs, 172 *U. S.*, 557.

Bacon vs. Walker, 204 *U. S.*, 311.

McLean vs. Arkansas, 211 *U. S.*, 546.

Ozan Lmber Co. vs. Union Co. Bank, 207 *U. S.*, 256.

New York, N. H. & H. Ry. Co. vs. New York, 165 *U. S.*, 268.

Clark vs. Kansas City, 176 *U. S.*, 114.

American Sugar Ref. Co. vs. Louisiana, 179 *U. S.*, 89.

Pacific Express Co. vs. Siebert, 142 *U. S.*, 339.

Mo., Kan. & Texas Ry. Co. vs. May, 194 *U. S.*, 276.

It has exercised that power and as the State court, construing this statute, said: "The legislature, in framing this statute, met a condition which existed, and not an imaginary or improbable one. The class of drummers or solicitors mentioned in the act are doubtless the only ones who ply their vocation to any extent on railroad trains. It is rare that the commercial drummer finds opportunity to meet customers and solicit trade on trains, therefore the lawmakers deemed it unnecessary to legislate against an occasional act of that kind."

Wiliams vs. State, 85 *Ark.*, 471.

"Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarily sitauted, is not within the amendment."

Barbier vs. Connolly, 113 *U. S.*, 27.

This law operates alike upon all whom it affects and equal protection is not denied where the law operates alike upon all persons similarly situated.

McLean vs. Arkansas, 211 *U. S.*, 546.
New York vs. Van De Carr, 199 *U. S.*, 552.
Western Turf Association vs. Greenburg, 204 *U. S.*, 359.
Bacon vs. Walker, 204 *U. S.*, 311.
Watson vs. Nervin, 128 *U. S.*, 578.
State vs. Schlemmer, 42 *La. Am.*, 8.
State vs. Moore, 104 *N. C.*, 714.
Ex parte Swann, 96 *Mo.*, 44.
Barbier vs. Connelly, 113 *U. S.*, 32.
Soon Hing vs. Crawley, 113 *U. S.*, 709.
Hayes vs. Missouri, 120 *U. S.*, 68.
Minneapolis & St. Louis Ry. Co., vs. Beckwith, 129 *U. S.*, 26.
Ky. Ry. Tax Cases, 115 *U. S.*, 321.
Magon vs. Ill. Trust & Savings Bank, 170 *U. S.*, 282.

Statutes are presumed to be constitutional and it is the duty of the courts in testing their validity to resolve all doubts in favor of legislative action. And, "when a State legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for

the law that would not require with equal force its extension to others whom it leaves untouched."

Mo., Kan. & Tex. Ry. Co. vs. May, 194 *U. S.,* 267.

"The legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

McLean vs. Arkansas, Supra.

This act regarded as a general regulation for the promotion of the comfort of the traveling public or as a regulation of the railroads or as a regulation of the kind of drummers included in it is well within the power of the State. It is constitutional and the judgment should be affirmed.

Respectfully submitted,

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C. A. CUNNINGHAM,
Assistant.

WILLIAM F. KIRBY,
of Counsel.

WILLIAMS *v.* STATE OF ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 138. Submitted March 11, 1910.—Decided April 4, 1910.

State legislation which in carrying out a public purpose is limited in its application, is not a denial of equal protection of the laws within the meaning of the Fourteenth Amendment if within the sphere of its operation it affects alike all persons similarly situated. *Barbier* v. *Connolly*, 113 U. S. 27.

When a state legislature has declared that, in its opinion, the policy of the State requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can clearly see that there is no reason why the law should not be extended to classes left untouched. *Missouri, Kansas & Texas Railway Co.* v. *May*, 194 U. S. 267.

A classification in a state statute prohibiting drumming or soliciting on trains for business for any "hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeon or other medical practitioner" will not be held by this court to be unreasonable and amounting to denial of equal protection of the laws, after it has been sustained by the state court as meeting an existing condition which was required to be met; and so held that the anti-drumming or soliciting law of Arkansas of 1907 is not unconstitutional because it relates to the above classes alone and does not prohibit drumming and soliciting for other purposes.

85 Arkansas, 470, affirmed.

THE facts, which involve the constitutionality of the anti-drumming law of Arkansas of 1907, are stated in the opinion.

Mr. George B. Rose, with whom *Mr. U. M. Rose*, *Mr. W. E. Hemingway*, *Mr. D. H. Cantrell* and *Mr. J. P. Loughborough* were on the brief, for plaintiff in error:

The act is unconstitutional as it deprives appellant of the liberty and the equal protection of the laws guaranteed by the Fourteenth Amendment.

It is an unlawful restriction upon the liberty of the citizen. The guaranty of life, liberty and the pursuit of happiness, secures to the citizen the right to pursue any calling not injurious to the public and to protect him against all interference with his business not in the lawful exercise of the police power. The police power is limited to those things essential to the safety, health, comfort and morals of the community, and any enactment seeking to restrict the liberty of a citizen in matters not falling within the scope of the police power as thus defined, is unconstitutional and void.

The occupation of drumming or soliciting for legitimate forms of business is not merely a lawful, but a most important, calling. In this particular instance, the appellant is earning his livelihood by drumming and soliciting for his own boarding house.

This is not a case of an occupation tax. The drummers are not taxed; they are forbidden altogether to exercise their callings. As to the right to pursue any lawful business, see *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 757; *Mugler* v. *Kansas*, 123 U. S. 623; *Lawton* v. *Steele*, 152 U. S. 137; *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Lochner* v. *New York*, 198 U. S. 57. The principles announced by this court have frequently been applied by the state courts. See *Bassett* v. *People*, 193 Illinois, 334; 62 N. E. Rep. 219, 220; *Bailey* v. *People*, 190 Illinois, 28; *People* v. *Gillison*, 98 N. Y. 108; 17 N. E. Rep. 343; *Ritchie* v. *People*, 155 Illinois, 88; 40 N. E. Rep. 454; *Ex parte Jacobs*, 98 N. Y. 105; *Ex parte Whitewell*, 98 California, 73; 32 Pac. Rep. 872; *People* v. *Beattie*, 89 N. Y. Supp. 193; *State* v. *Peel Splint Coal Co.*, 36 W. Va. 856; *State* v. *Goodwill*, 33 W. Va. 179; *Bracewell* v. *People*, 147 Illinois,

66; *People* v. *Warden*, 157 N. Y. 116; 51 N. E. Rep. 1006; 2 Hare's Am. Law, 777; Cooley's Const. Lim., 6th ed., 738.

The claim that this act merely prevents appellant from soliciting custom for his boarding house, and does not interfere with his right to conduct it, begs the question. The right to advertise a business and to solicit custom is essentially an incident to the right to do business. See *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, which has been approved in *Asher* v. *Texas*, 128 U. S. 129; *Stoutenburgh* v. *Hennick*, 129 U. S. 143; *Brennan* v. *Titusville*, 153 U. S. 289; *McCall* v. *California*, 136 U. S. 104; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Gunn* v. *White Sewing Machine Co.*, 57 Arkansas, 24; *Hurford* v. *State*, 91 Tennessee, 673; 20 S. W. Rep. 201; *Coit* v. *Scott*, 98 Tennessee, 258; 39 S. W. Rep. 1; *Clements* v. *Casper*, 9 Wyoming, 497; 35 Pac. Rep. 473; *Overton* v. *State*, 70 Mississippi, 559; 13 So. Rep. 227; *Pegues* v. *Ray*, 50 La. Ann. 579; 23 So. Rep. 904; *McLaughlin* v. *South Bend*, 126 Indiana, 472; 26 N. E. Rep. 185; *Bloomington* v. *Bourland*, 137 Illinois, 536; 27 N. E. Rep. 692; *Toledo Com. Co.* v. *Glenn Mfg. Co.*, 55 Ohio St. 222; 45 N. E. Rep. 197; *Mershon* v. *Pottsville Lumber Co.*, 187 Pa. St. 16; 40 Atl. Rep. 1018; *Simons Hdw. Co.* v. *McGuire*, 39 La. Ann. 850; 2 So. Rep. 592; *State* v. *Agee*, 83 Alabama, 112; 3 So. Rep. 856; *Stratford* v. *Montgomery*, 110 Alabama, 626; 20 So. Rep. 129; *State* v. *Bracco*, 103 N. C. 350; 9 S. E. Rep. 404; *Wrought Iron Range Co.* v. *Johnson*, 84 Georgia, 758; 11 S. E. Rep. 233; *Emmons* v. *Lewiston*, 132 Illinois, 382; 24 N. E. Rep. 58; *State* v. *Rankin*, 11 S. Dak. 148; 76 N. W. Rep. 299; *Ames* v. *People*, 25 Colorado, 511; 56 Pac. Rep. 725; *Ex parte Rosenblatt*, 19 Nevada, 441; 14 Pac. Rep. 298; *Fort Scott* v. *Pelton*, 39 Kansas, 766; 18 Pac. Rep. 954; *State* v. *Hickox*, 64 Kansas, 654; 68 Pac. Rep. 35; *Talbutt* v. *State*, 39 Tex. Crim. 65; 44 S. W. Rep. 1091; *French* v. *State*, 42 Tex. Crim. 224; 58 S. W. Rep. 1015; *State* v. *Hanaphy*, 117 Iowa, 18; 90 N. W. Rep. 601; *Adkins* v. *Richmond*, 98 Virginia, 101; 34 S. E. Rep. 967; *Stone* v. *State*, 117 Georgia, 296; 43 S. E. Rep. 740; *Commonwealth* v.

Pearl Laundry Co., 49 S. W. Rep. 28; *Wagner* v. *Meakin*, 92 Fed. Rep. 76; *In re Tinsman*, 95 Fed. Rep. 648; *In re Kimmel*, 41 Fed. Rep. 775; *In re Houston*, 47 Fed. Rep. 539; *In re Mitchell*, 62 Fed. Rep. 576; *In re Hough*, 69 Fed. Rep. 330; *Ex parte Loeb*, 72 Fed. Rep. 657; *Louisiana* v. *Lagarde*, 60 Fed. Rep. 186; *Ex parte Green*, 114 Fed. 959; *Delamater* v. *South Dakota*, 205 U. S. 100; *People* v. *Armstrong*, 73 Michigan, 288.

The statute cannot be justified on the principle that it applies only to persons traveling upon railroads. Passengers who avail themselves of their services do not surrender their liberty as citizens; nor can the act be justified on the ground that it tends to secure the comfort of other passengers. Cooley's Const. Lim., 6th ed., 510–518.

Under the common law, to solicit a person's patronage for a hotel or boarding house was not a crime, and therefore it is not within the power of the legislature to make such use of the right of free speech an offense.

The act also deprives the citizen of the equal protection of the law. It applies only to the keepers of hotels, lodging, eating and bath houses, among pursuits open to all the world. It applies also to medical practitioners; but as their vocation is one which concerns the public health and which is not pursued as of right, but only by leave of the State, they are legitimately subject to police regulation, and for the purposes of this case, they may be dismissed from our consideration.

Acts which single out one class of citizens and impose upon them burdens or restraints not imposed upon others, can only be justified by inherent differences. If they are merely arbitrary, they deny to the citizen the equal protection of the law guaranteed by the Fourteenth Amendment. The equal protection of the laws is a pledge of the protection of equal laws. See *Yick Wo* v. *Hopkins*, 118 U. S. 368. The requirement of equal laws does not exclude classification, but the classification must not be arbitrary. It must be based on reason. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S.

150; *Atchison, Topeka & Kansas R. R.* v. *Mathews*, 174 U. S. 96; *Railroad Tax Cases*, 13 Fed. Rep. 733; *Walley's Heirs* v. *Kennedy*, 2 Yerger, 554; 24 Amer. Dec. 512; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 555. See also *State* v. *Conlon*, 65 Connecticut, 478; 33 Atl. Rep. 521; *Millett* v. *People*, 117 Illinois, 284; 7 N. E. Rep. 635; *Ritchie* v. *People*, 155 Illinois, 88; 40 N. E. Rep. 456; *Frorer* v. *People*, 141 Illinois, 171; 31 N. E. Rep. 397; *Braceville Coal Co.* v. *People*, 147 Illinois, 66; 35 N. E. Rep. 63; *Dobbins* v. *Los Angeles*, 195 U. S. 236.

This court has of late refused to set aside a number of state laws on the ground that they were in conflict with the equality clause; but it seems that the case now presented shows an oppressive and inexcusable violation of the equality clause, and that the act should be held unconstitutional in so far as it applies to keepers of boarding houses.

Mr. Hal. L. Norwood, Attorney General of the State of Arkansas, *Mr. C. A. Cunningham* and *Mr. William F. Kirby*, for defendant in error:

The statute is a police regulation and clearly within the power of the State. The State has the inherent power to make all laws necessary for the protection of the health, safety, morals and comfort of its citizens and to promote the public convenience and general welfare.

The rights of property and liberty even, guaranteed by the Constitution against deprivation without due process of law, are subject to such reasonable restraints under the police power as the common good or general welfare may require. It is within the province of the legislature to declare the public policy and it has broad discretion to determine what the public interests require and what measures are necessary for their protection.

The purpose of the act is apparent. It was to promote the comfort of the public traveling upon railroad trains in the State, and especially of passengers journeying to Hot Springs,

where the halt, the lame, the sick and diseased of the earth, pain-laden, come to seek relief from their burden of suffering, in the justly world-famed healing waters, and protect them from annoyance from the insistent, harassing, persistent and continuous solicitations and importunities of the pestiferous drummer who made himself an insufferable nuisance.

The act was necessary, was within the power of the law-making body and is a wholesome regulation. *McLean* v. *Arkansas*, 211 U. S. 546; *Gundling* v. *Chicago*, 177 U. S. 183; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Adair* v. *United States*, 208 U. S. 172; *Lochner* v. *New York*, 198 U. S. 45, 53, 56; *Mugler* v. *Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley* v. *Christenson*, 137 U. S. 86; *In re Converse*, 137 U. S. 624; *Chicago, Burlington & Quincy Ry.* v. *Drainage Commissioners*, 200 U. S. 584; *Bacon* v. *Walker*, 204 U. S. 311. See also *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527; *Offield* v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372; *Plessy* v. *Ferguson*, 163 U. S. 537.

Railroads are vast enterprises, great highways of commerce, public highways, that are permitted to be organized and exist for the public convenience and benefit and are subject to such regulation as the public good may require. *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 293, 296; *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S. 641, 651.

The hotel drummer and hackman have long been regarded as belonging to that class of persons whose occupation or business may be regulated for the public good and the railroad companies themselves have the right to prohibit drumming or soliciting for hotels, boarding houses and hack lines upon their trains and depot platforms. *St. Louis, I. M. & S. Ry.* v. *Osborn*, 67 Arkansas, 399; *Landrigan* v. *State*, 31 Arkansas, 51; *Lindsay* v. *Anniston*, 104 Alabama, 261; *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; McQuillan on Municipal Ordinances, §§ 28, 184; *Emerson* v. *McNeil*, 84 Arkansas, 552.

The act does not deny plaintiff the equal protection of the law. The State has the power of classification in legislation, and as this court has said, "may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion." *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283; *Farmers' & Merchants' Ins. Co.* v. *Debney*, 189 U. S. 301; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Bacon* v. *Walker*, 204 U. S. 311; *McLean* v. *Arkansas*, 211 U. S. 546; *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 256; *New York, N. H. & H. Ry. Co.* v. *New York*, 165 U. S. 268; *Clark* v. *Kansas City*, 176 U. S. 114; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Mo., Kan. & Texas Ry. Co.* v. *May*, 194 U. S. 276.

This law operates alike upon all whom it affects and equal protection is not denied where the law operates alike upon all persons similarly situated. *McLean* v. *Arkansas*, 211 U. S. 546; *New York* v. *Van De Carr*, 199 U. S. 552; *Western Turf Association* v. *Greenburg*, 204 U. S. 359; *Bacon* v. *Walker*, 204 U. S. 311; *Watson* v. *Nervin*, 128 U. S. 578; *State* v. *Schlemmer*, 42 La. Ann. 8; *State* v. *Moore*, 104 N. C. 714; *Ex parte Swann*, 96 Missouri, 44; *Barbier* v. *Connolly*, 113 U. S. 32; *Soon Hing* v. *Crawley*, 113 U. S. 709; *Hayes* v. *Missouri*, 120 U. S. 68; *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U. S. 26; *Ky. Ry. Tax Cases*, 115 U. S. 321; *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 282.

Statutes are presumed to be constitutional and it is the duty of the courts in testing their validity to resolve all doubts in favor of legislative action. *Mo., Kan. & Tex. Ry. Co.* v. *May*, 194 U. S. 267; *McLean* v. *Arkansas*, *supra*.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Plaintiff in error was convicted for violating a statute of the State of Arkansas, entitled "An act for the protection of passengers, and for the suppression of drumming and soliciting upon railroad trains and upon the premises of common

carriers," approved April 30, 1907. Acts of General Assembly, 1907, p. 553, Act, 236.

The first and second sections of that act are as follows:

"SEC. 1. That it shall be unlawful for any person or persons, except as hereinafter provided in section 2 of this act, to drum or solicit business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, on the train, cars, or depots of any railroad or common carrier operating or running within the State of Arkansas.

"Any person or persons plying or attempting to ply said vocation of drumming or soliciting, except as provided in section 2 of this act, upon the trains, cars, depots of said railroads or common carriers, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty ($50) nor more than one hundred dollars ($100) for each offense.

"SEC. 2. That it shall be unlawful for any railroad or common carrier operating a line within the State of Arkansas knowingly to permit its trains, cars or depots within the State to be used by any person or persons for drumming or soliciting business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, or drumming or soliciting for any business or profession whatsoever; except, that it may be lawful for railroads or common carriers to permit agents of transfer companies on their trains to check baggage or provide transfers for passengers, or for persons or corporations to sell periodicals and such other articles as are usually sold by news agencies for the convenience and accommodation of said passengers.

"And it shall be the duty of the conductor or person in charge of the train of any railroad or common carrier to report to the prosecuting attorney any person or persons found violating any of the provisions of this act, and upon a wilful failure or neglect to report any such person or persons known to be violating the provisions of this act by drumming

or soliciting said conductor or other person in charge of such train shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars."

The case was tried upon the following agreed statement of facts:

"The defendant has for six years been keeping a boarding house in the city of Hot Springs and was keeping the same on the 10th day of December, 1907, when he entered a train of the Little Rock and Hot Springs Western Railway Company while running in the county of Garland and State of Arkansas, and solicited and drummed the passengers on said train to induce them to come to his said boarding house to board during their sojourn in said city; and said defendant was so engaged in drumming and soliciting upon said train when he was arrested. He had paid his fare as a passenger on said train, and was riding as such passenger while engaged in drumming and soliciting."

Plaintiff in error challenged the act as unconstitutional on the grounds that it deprived him of liberty and property without due process of law, and also of the equal protection of the law guaranteed by the Fourteenth Amendment.

The principles that govern this case have been settled by very many adjudications of this court. They were sufficiently set forth in *McLean* v. *State of Arkansas*, 211 U. S. 546, in which a statute making it unlawful for mine owners, employing ten or more men underground in mining coal and paying therefor by the ton mined, to screen the coal before it was weighed, was held valid; and also that it was not an unreasonable classification to divide coal mines into those where less than ten miners were employed and those where more than that number were employed, and that a state police regulation was not unconstitutional under the equal protection clause of the Fourteenth Amendment, because only applicable to mines where more than ten miners were employed. This court in that case, discussing the police power, said:

"In *Gundling* v. *Chicago*, 177 U. S. 183, this court summarized the doctrine as follows:

"'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary interfered with or destroyed, without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.'

"In *Jacobson* v. *Massachusetts*, 197 U. S. 11, this court said:

"'But the liberty secured by the Constitution of the United States to every person within its jurisdiction, does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is subject for the common good.'

"It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health and welfare of the people. . . .

"The legislature being familiar, with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.

* * * * * * * *

"If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

And see *Donovan* v. *Pennsylvania Company*, 199 U. S. 279.

In the present case the Supreme Court of Arkansas (*Williams* v. *State*, 85 Arkansas, 470) said:

"The legislature clearly has the power to make regulation for the convenience and comfort of travelers on railroads, and this appears to be a reasonable regulation for their benefit. It prevents annoyance from the importunities of drummers. It is suggested in argument that the statute was especially aimed at the protection of travelers to the city of Hot Springs. If this be so, we can readily see additional reason why the regulation is a wholesome one. A large percentage of those travelers are persons from distant States, who are mostly complete strangers here, and many are sick. Drummers who swarm through the trains soliciting for physicians, bath houses, hotels, etc., make existence a burden to those who are subjected to their repeated solicitations. It is true that the traveler may turn a deaf ear to these importunities, but this does not render it any the less unpleasant and annoying. The drummer may keep within the law against disorderly conduct, and still render himself a source of annoyance to travelers by his much beseeching to be allowed to lead the way to a doctor or a hotel.

"It is also argued that the act, literally construed, would prevent any person of the classes named from carrying on a private conversation on a train concerning his business. This is quite an extreme construction to place upon the statute, and one which the legislature manifestly did not intend. We have no such question, however, before us on the facts presented in the record.

"This statute is not an unreasonable restriction upon the privilege one should enjoy to solicit for his lawful business,

which, it is rightly urged, is an incident to any business. It does not prevent any one from advertising his business or from soliciting patronage, except upon trains, etc. This privilege is denied him for the public good. It is a principle which underlies every reasonable exercise of the police power that private rights must yield to the common welfare."

As to the objection that the act discriminated against plaintiff in error and denied him the equal protection of the law, because forbidding the drumming or soliciting business or patronage on the trains for any "hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner," which it was contended was an unreasonable classification, the state Supreme Court said:

"The legislature, in framing this statute, met a condition which existed, and not an imaginary or improbable one. The class of drummers or solicitors mentioned in the act are doubtless the only ones who ply their vocation to any extent on railroad trains. It is rare that the commercial drummer finds opportunity to meet customers and solicit trade on trains, therefore the lawmakers deemed it unnecessary to legislate against an occasional act of that kind."

It is settled that legislation which "in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment," *Barbier* v. *Connolly*, 113 U. S. 27, and "When a State legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the court under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Missouri, Kansas & Texas Ry. Co.* v. *May*, 194 U. S. 267.

Judgment affirmed.